

SOLICITATIONS FOR REQUIREMENTS CONTRACT MUST INCLUDE REALISTIC ESTIMATED QUANTITIES, NOT JUST HISTORICAL DATA

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In a recent decision overruling the Court of Federal Claims, the Federal Circuit upheld a contractor's claim of negligent estimates in a requirements contract, where the agency provided historical data in the solicitation, but failed to include information on anticipated troop movements and a surge of equipment and material that would become part of the contract as the units departed. *Agility Defense & Gov't Services, Inc. v. United States*, 847 F.3d 1345 (Fed. Cir. 2017).

REQUIREMENTS CONTRACTS

A requirements contract provides for filling all of the purchase requirements of designated Government activities for supplies or services during a specified contract period from a single contractor, with deliveries or performance to be scheduled by placing orders with that contractor. Federal Acquisition Regulation ("FAR") 16.503(a). The FAR states that a requirements contract may be appropriate when the Government anticipates recurring requirements but cannot predetermine the precise quantities of supplies or services that designated Government activities will need during a definite period. FAR 16.503(b)(1). Because the agency cannot state precise quantities, the FAR requires that:

For the information of offerors and contractors, the contracting officer shall state a realistic estimated total quantity in the solicitation and resulting contract. This estimate is not a representation to an offeror or contractor that the estimated quantity will be required or ordered, or that conditions affecting requirements will be stable or normal. The contracting officer may obtain the estimate from records of previous requirements and consumption, or by other means, and should base the estimate on the most current information available. FAR 16.503(a)(1).

AGILITY DEFENSE

The Defense Reutilization and Marketing Services ("DRMS"), an agency of the Defense Logistics Agency, disposes of surplus military property at Defense Reutilization and Marketing Offices after the military leaves an area of operations. Up until 2006, the government operated all of the marketing offices, but in 2006, the DRMS Director determined that it could not sustain its workload unless it brought in outside contractors. DRMS issued a solicitation for performance of the marketing offices for up to five years. Aside from giving workload history, the solicitation included a chart that projected a stable workload for the first two years, and then "workload declines" for option years 3-5, down 75%, 50% and 30% respectively. DRMS made

award to Agility, the lowest priced offer, at a price that was \$23 million or 34% below the next offeror. Agility's proposal made it clear that it had relied on the DRMS estimates.

In performing the contract, the workload from the outset was substantially higher than predicted. After the contract was terminated for convenience, Agility submitted claims for additional costs (\$5.9 million) associated with its performance, alleging inaccurate workload estimates during solicitation.

The Federal Circuit noted that a contractor can recover damages in a requirements contract under a "negligent estimate" theory, which requires that the contractor show that government estimates were "inadequately or negligently prepared, not in good faith, or grossly unreasonable at the time the estimate was made." As noted above, the FAR required DRMS to provide a "realistic estimate" of workload. The Court of Federal Claims had ruled for the government because DRMS has provided historical data and had not negligently estimated it needs.

The Federal Circuit reversed, finding the Court of Federal Claims ruling was clearly erroneous for two reasons:

- 1) The Claims Court ignored that DRMS did not only provide historical data, it improperly estimated its future requirements in the solicitation, incorrectly projecting them to remain constant and then decline.
- 2) The Claims Court never addressed evidence that DRMS's historical data was not the most current information available, as required by the FAR. During the solicitation, DRMS possessed information regarding its anticipated requirements above and beyond its historical requirements-- DRMS was aware of a planned troop movement and a surge of equipment and material that would be turned over to DRMS as units departed. In fact, the memo noting this fact explicitly stated that the surge was one of the key reasons that caused this contract to be solicited and awarded.

The Federal Circuit held that because of the increased workload anticipated by DRMS, merely providing offerors with historical workload was not the most current information sufficient to provide a *realistic* estimate under FAR 16.503. The Court noted that providing offerors with historical data is not necessarily reasonable *per se* if there is more realistic data.

TIPS: Although it may be difficult to prove, "negligent estimates" in the solicitation for a requirements contract is a valuable theory if the actual workload is much greater than anticipated in a solicitation. In many ways, the situation described herein is the reverse of the contractor's defective pricing situation where a contractor knows it will be changing a production process or something else that has a significant impact to lower price, but fails to disclose that to the government during contract formation. Here the government knew it would be changing something that would have a significant impact to increase the contractor's workload and price, but failed to disclose that to the offerors so they could properly price their proposals.